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IN THE

Supreme Court of the United States

OCTOBER TERM, 1997

LOUDOUN COUNTY BOARD OF EDUCATION,
Petitioner,

v.

MARK HARTMANN, a minor by his parents and next friends, Roxanna and Joseph Hartmann, and ROXANNA AND JOSEPH HARTMANN,
Respondents.

On Petition For a Writ of Certiorari to the United States Court of Appeals For the Fourth Circuit

BRIEF IN OPPOSITION TO CONDITIONAL CROSS-PETITION

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The Cross-Respondents, Mark Hartmann, Roxanna Hartmann and Joseph Hartmann, respectfully request that the Court deny the Conditional Cross-Petition submitted by the Cross-Petitioners in this case.

STATEMENT OF CASE

This Conditional Cross-Petition asserts that the underlying case should have been dismissed for mootness because Mark Hartmann has not been receiving educational services from the cross-petitioner, the Loudoun County School Board (hereinafter referred to as "Loudoun") and has been receiving a free appropriate public education elsewhere.

This contention was previously raised by Loudoun before the state reviewing officer, the federal district court and the Fourth Circuit court of appeals. Each and every time Loudoun has raised this argument it has been rejected.[1]

REASON FOR DENYING THE WRIT

Loudoun has requested that this Court review the Fourth Circuit's legal conclusion that the instant case was not moot. At best, the questions presented involve the "misapplication of a properly stated rule of law". These questions do not present any compelling or novel issues and do not warrant review by this Court.

I. THE FOURTH CIRCUIT CORRECTLY FOUND THAT THE CASE WAS NOT MOOT AS A RESULT OF THE ENROLLMENT OF MARK HARTMANN IN THE MONTGOMERY COUNTY PUBLIC SCHOOL SYSTEM.

The state reviewing officer, the district court and the Fourth Circuit all rejected Loudoun's argument that the instant case was moot. The court of appeals found that

> Loudoun contends that the Hartmanns do not present a valid case of controversy because Mark is currently in an educational placement which the Hartmanns find appropriate. Under the unusual circumstances of this case, this conclusion is not correct. There is no question that the Hartmanns would re-enroll Mark in Loudoun County if their suit is successful. Specifically, the Hartmann's expressed intent to return Mark to school there is corroborated by the fact that Mark's father and sister continue to occupy the family home in Loudoun County.

A-6. This finding correctly applies the legal theory of "mootness".

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[1] *See* Hartmann's Petition for Writ: Opinion of the court of appeals, A-6; Opinion of the district court, A-21-22; Opinion of state reviewing officer, A-42.

A. This case is not moot because the continuing conflict between the Hartmanns and Loudoun renders this action capable of repetition yet evading review.

By their very nature, cases filed pursuant to the Individuals with Disabilities Education Act , 20 U.S.C. §§ 1400 *et. seq.*, (hereinafter "IDEA") can rarely be concluded before the end of a school year, and almost always present the question of whether there continues to be a live controversy. The standard for determining whether a case circumvents the mootness doctrine is well-known: whether "the conduct originally complained of is capable of repetition, yet evading review." In *Honig v. Doe*, 484 U.S. 305, 318 (1988)[2] this Court stated

> Although at present [the student] is not faced with any proposed expulsion or suspension proceedings, **and indeed no longer even resides within the SFUSD [school district]**, he remains a resident of California and is entitled to a "free appropriate public education" within that State. His claims under the EHA [now IDEA] therefore are not moot if the conduct he originally complained of is "capable of repetition, yet evading review." (Emphasis added.)

A school district's conduct, challenged under IDEA, is "capable of repetition if there is a reasonable expectation or a demonstrated probability that the same controversy will

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[2] While this Court did declare moot the case of one of the plaintiffs in *Honig*, that plaintiff was no longer entitled to services under the IDEA because of his age (24). That holding has no application to the instant case which involves an eleven year old entitled under the IDEA to educational services.

recur." *Daniel R.R.*, 874 F.2d at 1040.[3] A philosophical breach between a school district and the child provides for finding a continuing controversy. In *Daniel R.R.* the Fifth Circuit ruled that a challenge to a two year old IEP was not moot because there were "irreconcilable views on the issue, whether and to what extent to mainstream Daniel . . ." 874 F.2d at 1041. Daniel's parents sought to have their son educated in the regular education classroom. The school system refused and the parents placed their son in a private school while they pursued administrative and judicial relief. The court stated

> The conduct about which Daniel originally complained is [the school district's] refusal to mainstream him. . . . Each side of this controversy steadfastly adheres to its perception of the [IDEA's] mainstreaming requirement. Given the parties irreconcilable views . . . The parties have a reasonable expectation of confronting this controversy every year that Daniel is eligible for public education.
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> * * *
>
> Nor does Mr. and Mrs. R's recent decision to remove Daniel from the [school] system render the case moot. Although Daniel no longer attends public school, he remains a citizen of the State of Texas and, thus, remains entitled to a free appropriate public education in the state. Given Daniel's continued eligibility for public educational services under the [IDEA], the mainstreaming controversy remains capable of repetition. See *Honig*, 484 U.S. at ___ ___, 108 S. Ct. at 602-603, 98 L.Ed2d at 703-704.

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[3] See also *DeVries v. Spillane*, 853 F. 2d 264, 268 (4th Cir. 1988), "IDEA cases are classic cases for the application of the 'capable of repetition yet, evading review' rule."

Similarly, the Ninth Circuit has held that a challenge under IDEA is not moot where the school district and the parents "have conflicting educational philosophies and perceptions of the District's mainstreaming obligation." *Sacramento v. Holland*, 14 F.3d 1398, 1403 (9th Cir. 1994), *cert. denied*, 114 S. Ct. 2679 (1994). In *Holland*, as in the present case, the school district vehemently opposed the parents' desire to have their child educated in a regular education classroom.

When the parties in an IDEA case hold staunchly opposing views of what is best for a child, the mootness doctrine does not apply because the controversy is capable of repetition yet would evade review under the mootness doctrine. This is true even if the parents remove their child from the school district to ensure the child's educational progress. In *Lee v. Biloxi School District*, 963 F.2d 837, 839 (5th Cir. 1992) the mother of a handicapped child, prompted by a dispute with the school system, sent her daughter to live with her father in another school district. The court stated

> . . . here, [the mother] removed her child from the [school district] and simultaneously sought judicial review from the decisions she believed to be illegal and, more importantly, detrimental to her child's well being and educational best interest. ... As in *Daniel R.R.*, [the mother's] refusal to sacrifice critical years of her daughter's development pending time-consuming review proceedings does not render her case moot.

As both the Fifth and Sixth Circuits have conclusively determined, the parents' "refusal to sacrifice critical years of . . . development pending time-consuming review proceedings does not render [the] case moot. To hold otherwise effectively would insulate [IDEA] claims from judicial review" and it would require parents to submit to educational

placements which they believe "to be illegal and detrimental to their child's well being and educational interests." *Id.*

The case of *Union School District v. Smith*, 15 F.3d 1519, 1524-25 (9th Cir, 1994) presents a strikingly similar fact pattern to the instant case. The Smiths were dissatisfied by the school district's proposed placement. They identified an appropriate private program outside of the school district in which they placed their child. Given the distance between the family home and the school, the student's mother maintained a second residence for the sole purpose of being able to commute daily to the educational program for her son. The family maintained their permanent residence where the father continued to reside and work. The court concluded that under the IDEA (and California law) the child continued to reside within the school district where the educational dispute arose. The court rejected the school district's contention that they were not responsible to provide educational services to the child.

Loudoun's citation of *Monahan v. State of Nebraska*, 687 F.2d 1164 (8th Cir. 1982) is easily distinguishable from the instant case. Cross-Petition, p.14.[4] In *Monahan* the plaintiff was the father as next friend for his daughter. His daughter, however, was a married adult over the age 18 who did not reside within the school district. Mark Hartmann, an eleven year old, is both a resident and domiciliary of Loudoun County.

Loudoun's citation of *Dennin v. Connecticut Interscholastic Athletic Conference (CIAC)*, 94 F.3d 96 (2nd Cir. 1996) is equally unpersuasive. CP-15. In *Dennin* a student sought declaratory and injunctive relief so that he could participate on the swim team for the 1995-1996 season. The student obtained the relief sought and was able to compete. CIAC appealed this decision. By the time the case was heard by the court of appeals the swim season had ended.

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[4] Loudoun's Conditional Cross-Petition will hereinafter be designated as "CP" followed by the page number.

Based on the representations of the student that he did not intend to compete the following season, the court of appeals concluded that the case was not capable of repetition and was therefore moot. There is no rational analogy between the facts and holding in *Dennin* and the case presented by Mark Hartmann.

Neither the removal of the child from the school district's educational programs, nor the child's change in residence is sufficient to render IDEA cases moot. Although the Hartmanns chose to avail themselves of a public school as an alternative program rather than a private school, they stand in the same position as any other parents who chooses to remove their child from the public school system during the course of litigation.

A controversy under the IDEA remains "live" so long as the student continues to be entitled to an education under IDEA and the issue can reasonably be expected to be repeated. Whether or not Mark was receiving services from Loudoun is irrelevant. Based on this well established criteria the Fourth Circuit properly found that the instant case presented a live controversy and refused to dismiss the case as moot.

B. Mark Hartmann is a resident of both Montgomery County and Loudoun County and entitled to a Free Appropriate Public Education in whichever county the Hartmanns choose.

Loudoun argues that Mark Hartmann is a resident of Montgomery County not Loudoun County and therefore they are not required to provide him with educational services under the IDEA and state law. While Mark cannot be educated simultaneously in Montgomery County and Loudoun County, under Virginia law he can and does reside in both counties and therefore has a right to be educated in whichever county his parents choose. In *State-Planters Bank v. Commonwealth*, 174 Va. 289, 295 (1940) the Supreme Court of Virginia stated "Domicile and residence are not words of equivalent meaning. One may have a residence at a place without having a domicile

there. A person may have more than one residence, while he can have only one domicile." [5]

Ironically, when Mrs. Hartmann attempted to enroll Mark in the Montgomery County School System the School Board for Montgomery County sought to enjoin Mark from attending. They argued that he was a resident of Loudoun County. The judge refused to issue an injunction finding that Mark was entitled to receive an education in Montgomery County pursuant to Section 22.1-3 of the Virginia Code. The judge stated "Mark and his mother are domiciled in Loudoun County. They are, however, residents of Blacksburg, Montgomery County, as well as Loudoun."[6] Because Mark is both a domiciliary and a resident of Loudoun County his parents may at anytime request that he be enrolled in the Loudoun County Public School System and Loudoun will be required to educate him.

C. The Hartmann's have sought educational services from Loudoun.

Loudoun argues that the Hartmanns have not sought educational services from them since December 1994 and therefore the case is moot. *CP-13.* This argument simply ignores the nature of the ongoing administrative and legal proceedings which have continued since Mark was withdrawn from the Loudoun school system. In filing their civil action the Hartmann's specifically sought a court order which would require Loudoun to provide Mark with educational services in the regular education classroom. At anytime during these proceedings Loudoun could have rendered the case moot by agreeing to provide Mark with the educational services requested by the Hartmanns. They chose not to do so. After

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[5] See also *Aetna Casualty and Surety Co. v. Shambaugh*, 747 F. Supp. 1203 (N.D.W.Va. 1990) holding that under West Virginia law a person may have dual residency, especially in the case of children of divorced parents.

[6] This decision was made part of the record before both the district court and the court of appeals.

being ordered by the district court to provide these services Loudoun again chose the route of litigation over education by appealing to the Fourth Circuit and obtaining a stay of the district court's order pending the appeal.

Given these circumstances it is incontrovertible that the Hartmanns were pursuing education services from Loudoun. That Loudoun has chosen not to provide the educational services requested by the Hartmanns is certainly no grounds for dismissing this case as moot.

D. The Instant Case should not be dismissed on equitable grounds.

The Hartmanns, and similarly situated parents such as those in *Daniel R., Union School District* and *Lee*, are faced with agonizing decisions about the educational needs of their children. In order to provide Mark with a free appropriate public education and demonstrate that a well designed program in the regular public school classroom would work for Mark, the Hartmanns, by necessity, had to enroll their son in a public school outside of Loudoun County. Unlike many parents, the Hartmanns could not have unilaterally placed Mark in a private placement and then sought reimbursement for the tuition.[7] The IDEA's purpose of "maximiz[ing] parental involvement in the education of each handicapped child," *Hendrick Hudson Central School District v. Rowley*, 458 U.S. 176, at 182 n.6; 102 S. Ct. 3034, 3038; 73 L.Ed. 690 (1982) would be eviscerated if the Hartmann's very concern for the education of their child precluded their ability to seek review of a placement with which they disagree.

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[7] This Court expressly recognized the parents right to pursue its legal rights under IDEA while unilaterally placing their child in a private school because they believed the school district was not providing the child with a free appropriate public education. *Town of Burlington v. Dept. of Education*, 484 U.S. 305; 108 S.Ct. 592, 601; 98 L.Ed.2D 686, 703 (1988); *Carter v. Florence County*, 114 S. Ct. 361 (1993).

CONCLUSION

For the reasons stated above, the Hartmanns respectfully requests that the Conditional Cross-Petition for Writ of Certiorari be denied.

Respectfully submitted,

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